

Environmental Protection Agency

§ 78.3

(vi) The approval or disapproval of a petition under § 96.375 of this chapter.

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§ 78.2 General.

Part 72 of this chapter, including §§ 72.2 (definitions), 72.3 (measurements, abbreviations, and acronyms), 72.4 (Federal authority), 72.5 (State authority), 72.6 (applicability), 72.7 (new units exemption), 72.8 (retired units exemption), 72.9 (standard requirements), 72.10 (availability of information), and 72.11 (computation of time), shall apply to appeals of any final decision of the Administrator under parts 72, 73, 74, 75, 76, or 77 of this chapter.

[58 FR 3760, Jan. 11, 1993, as amended at 69 FR 21645, Apr. 21, 2004]

§ 78.3 Petition for administrative review and request for evidentiary hearing.

(a)(1) The following persons may petition for administrative review of a decision of the Administrator that is made under parts 72, 74, 75, 76, and 77 of this chapter and that is appealable under § 78.1(a) of this part:

- (i) The designated representative for the unit covered by the decision;
- (ii) The authorized account representative for an account covered by the decision; and
- (iii) Any interested person.

(2) The following persons may petition for administrative review of a decision of the Administrator that is made under part 73 of this chapter and that is appealable under § 78.1(a):

- (i) The authorized account representative for any Allowance Tracking System account covered by the decision; and
- (ii) With regard to the decision on the allocation of allowances from the Conservation and Renewable Energy Reserve, the certifying official whose application is covered by the decision.

(3) The following persons may petition for administrative review of a decision of the Administrator that is made under part 97 of this chapter and that is appealable under § 78.1(a) of this part:

- (i) The NO_x authorized account representative for the unit or any NO_x Al-

lowance Tracking System account covered by the decision; or

- (ii) Any interested person.

(b)(1) Within 30 days following issuance of a decision under § 78.1 of this part by the Administrator, any person under paragraph (a) of this section may file a petition with the Environmental Appeals Board for administrative review of the decision. If no petition for administrative review of a decision under § 78.1 of this part is filed within such period, the decision shall become final agency action and shall not meet the prerequisite for judicial review under § 78.1(a)(2).

(2) The petition may include a request for an evidentiary hearing to resolve any disputed issue of material fact concerning the decision.

(3) At the same time that the petition for administrative review is filed, the petitioner shall:

- (i) Serve a copy of the petition on the designated representative or authorized account representative under paragraph (a)(1) and (2) of this section (unless the designated representative or authorized account representative is the petitioner) or the NO_x authorized account representative under paragraph (a)(3) of this section (unless the NO_x authorized account representative is the petitioner) and the Administrator; and
- (ii) Mail a notice of the petition to the air pollution control agencies of affected States and any interested person.

(c) The petition for administrative review under this part shall state with specificity:

- (1) Each material factual and legal issue alleged to be in dispute and any such factual issue for which an evidentiary hearing is sought;
- (2) A clear and concise statement of the nature and scope of the interest of the petitioner;
- (3) A clear and concise brief in support of the petition, explaining why the factual or legal issues are material and, if an evidentiary hearing is requested, why direct and cross-examination of witnesses is necessary to resolve such factual issues;
- (4) If an evidentiary hearing is requested, the time estimated to be necessary for an evidentiary hearing;

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(5) If an evidentiary hearing is requested, a certified statement that, in the event of an evidentiary hearing, and without cost or expense to any other party, any of the following persons shall be available to appear and testify:

- (i) The petitioner; and
- (ii) Any officer, director, employee, consultant, or agent of the petitioner.

(6) Specific references to the contested portions of the decision; and

(7) Any revised or alternative action of the Administrator sought by the petitioner as necessary to implement the requirements, purposes, or policies of title IV of the Act or part 97 of this chapter, as appropriate.

(d) In no event shall a petition for administrative review be filed, or review be available under this part, with regard to:

(1) Any provision or requirement of part 72, 73, 74, 75, 76, or 77 of this chapter, including any standard requirement under § 72.9 of this chapter and any emissions monitoring or reporting requirements under part 75 of this chapter;

(2) Any provision or requirement of part 97 of this chapter, including the standard requirements under § 97.6 of this chapter and any emission monitoring or reporting requirements under part 97 of this chapter.

(3) The reliance by the Administrator on a certificate of representation submitted by a designated representative or a certification statement submitted by an authorized account representative under the Acid Rain Program or on an account certificate of representation submitted by a NO_x authorized account representative or an application for a general account submitted by a NO_x authorized account representative under the NO_x Budget Trading Program; and

(4) Actions of the Administrator under sections 112(r), 113, 114, 120, 301, and 303 of the Act.

[58 FR 3760, Jan. 11, 1993, as amended at 60 FR 17132, Apr. 4, 1995; 62 FR 55488, Oct. 24, 1997; 69 FR 21645, Apr. 21, 2004]

EFFECTIVE DATE NOTE: At 70 FR 25338, May 12, 2005, § 78.3 was amended by:

a. In paragraph (b)(3)(i), adding the words “or the CAIR designated representative or CAIR authorized account representative

under paragraph (a)(4), (5), or (6) of this section (unless the CAIR designated representative or CAIR authorized account representative is the petitioner)” after the words “(unless the NO_x authorized account representative is the petitioner)”;

b. In paragraph (c)(7), replacing the words “or part 97 of this chapter, as appropriate” with the words “, subparts AA through II of part 96 of this chapter, subparts AAA through III of part 96 of this chapter, subparts AAAA through IIII of part 96 of this chapter, or part 97 of this chapter, as appropriate”;

c. In paragraph (d)(3), adding the words “or on an account certificate of representation submitted by a CAIR designated representative or an application for a general account submitted by a CAIR authorized account representative under subparts AA through II, subparts AAA through III, or subparts AAAA through IIII of part 96 of this chapter” after the words “under the NO_x Budget Trading Program”;

d. Adding new paragraphs (a)(4), (a)(5), (a)(6), (d)(5), (d)(6), and (d)(7), effective July 11, 2005. For the convenience of the user, the added and revised text is set forth as follows:

§ 78.3 Petition for administrative review and request for evidentiary hearing.

(a) * * *

(4) The following persons may petition for administrative review of a decision of the Administrator that is made under subparts AA through II of part 96 of this chapter and that is appealable under § 78.1(a):

(i) The CAIR designated representative for a unit or source, or the CAIR authorized account representative for any CAIR NO_x Allowance Tracking System account, covered by the decision; or

(ii) Any interested person.

(5) The following persons may petition for administrative review of a decision of the Administrator that is made under subparts AAA through III of part 96 of this chapter and that is appealable under § 78.1(a):

(i) The CAIR designated representative for a unit or source, or the CAIR authorized account representative for any CAIR SO₂ Allowance Tracking System account, covered by the decision; or

(ii) Any interested person.

(6) The following persons may petition for administrative review of a decision of the Administrator that is made under subparts AAAA through IIII of part 96 of this chapter and that is appealable under § 78.1(a):

(i) The CAIR designated representative for a unit or source, or the CAIR authorized account representative for any CAIR Ozone Season NO_x Allowance Tracking System account, covered by the decision; or

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- (ii) Any interested person.

* * * *

- (d) * * *

(5) Any provision or requirement of subparts AA through II of part 96 of this chapter, including the standard requirements under § 96.106 of this chapter and any emission monitoring or reporting requirements.

(6) Any provision or requirement of subparts AAA through III of part 96 of this chapter, including the standard requirements under § 96.206 of this chapter and any emission monitoring or reporting requirements.

(7) Any provision or requirement of subparts AAAA through IIII of part 96 of this chapter, including the standard requirements under § 96.306 of this chapter and any emission monitoring or reporting requirements.

§ 78.4 Filings.

(a) All original filings made under this part shall be signed by the person making the filing or by an attorney or authorized representative. Any filings on behalf of owners and operators of an affected unit or affected source shall be signed by the designated representative. Any filings on behalf of persons with an interest in allowances in a general account shall be signed by the authorized account representative. Any filings on behalf of owners and operators of a NO_x Budget unit or source shall be signed by the NO_x authorized account representative. Any filings on behalf of persons with an interest in NO_x allowances in a general account shall be signed by the NO_x authorized account representative. The name, address, telephone number, and facsimile number of the person making the filing shall be provided with the filing.

(b)(1) All data and information referred to, or in any way relied upon, in any filings made under this part shall be included in full and may not be incorporated by reference, unless the data or information is contained in the administrative record for the decision being appealed.

(2) Notwithstanding paragraph (b)(1) of this section, State or Federal statutes, regulations, and judicial decisions published in a national reporter system, officially issued EPA documents of general applicability, and any other publicly and generally available reference material may be incorporated

by reference. Any person incorporating such materials by reference shall provide copies of the materials as instructed by the Environmental Appeals Board or the Presiding Officer.

(3) If any part of any filing is in a foreign language, it shall be accompanied by an English translation verified by the person making the translation, under oath, to be complete and accurate, together with the name, address, and a brief statement of the qualifications of the person making the translation. Translations filed of material originally produced in a foreign language shall be accompanied by copies of the original material.

(4) Where relevant data or information is contained in a document also containing irrelevant matter, either the irrelevant matter shall be deleted or an index to the relevant portions of the document shall be included in the document.

(c)(1) Failure to comply with the requirements of this section or any other requirement in this part may result in the noncomplying portions of the filing being excluded from consideration. If the Environmental Appeals Board or the Presiding Officer determines on motion by any party or *sua sponte* that a filing fails to meet any requirement of this part, the Environmental Appeals Board or Presiding Officer may return the filing, together with a reference to the applicable requirements on which the determination is based. A person whose filing has been rejected has 7 days (or other reasonable period established by the Environmental Appeals Board or Presiding Officer), from the date the returned filing is mailed, to correct the filing in conformance with this part and refile it.

(2) The making of a filing shall not mean or imply that the filing, in fact, meets all applicable requirements, that the filing contains reasonable grounds for the action requested, or that the action requested is in accordance with law.

(d) An original and two copies of any written filing under this part shall be filed with the Environmental Appeals Board unless a proceeding is pending before a Presiding Officer, in which